

OVERVIEW OF THE STATUTORY EXEMPTION FOR THE MAINTENANCE OF WORKS

I. THE MAINTENANCE EXEMPTION

Part IV of Chapter 373, Florida Statutes, (F.S.), requires any person proposing to construct, alter, or operate a dam, impoundment, reservoir, appurtenant work, or works, to obtain a permit from the District. However, the question often arises as to whether a permit is required when work is being done to an existing insect control structure, dike, irrigation or drainage ditch, existing manmade canal, channel, basin, berth, intake, or discharge structure.

The answer to this question will depend upon whether the work is a maintenance activity or an alteration of an existing work. Maintenance activities, which meet the requirements discussed herein, do not normally require a permit. The alteration of an existing work, however, will normally require a permit. It is strongly recommended that District staff be contacted, before any work begins, to determine if the proposed work falls within the maintenance exemption.

Subsection 373.403(8), F.S., defines maintenance as follows:

"Maintenance" or "repairs" means remedial work of a nature as may affect the safety of any dam, impoundment, reservoir, or appurtenant work or works, but excludes routine custodial maintenance.

Paragraph 403.813(2)(f), F.S., exempts many maintenance dredging activities from permitting requirements.

Paragraph 403.813(2)(g), F.S., exempts maintenance of insect control facilities, with certain restrictions, as follows:

- (2) No permit under this chapter, chapter 373...shall be required for activities associated with the following types of projects...

(g) the maintenance of existing insect control structures, dikes, and irrigation and drainage ditches, provided that spoil material is deposited on a self contained, upland spoil site which shall prevent the escape of the spoil material into waters of the state.... **In all cases, no more dredging is to be performed than is necessary to restore the dike, irrigation or drainage ditch to its original design specifications.** [emphasis added]

Both the statutes and caselaw rely heavily on the original design specifications to determine whether an activity is exempt and whether or not exempt maintenance activities can occur or have occurred.

Rule 40E-4.051(2), Florida Administrative Code, is the SFWMD's rule implementing the statutory exemption for maintenance of systems. It essentially tracks the statutory language of Section 403.813, F.S., and is applicable to maintenance dredging of existing manmade canals, channels, basins, berths, and intake and discharge structures.

II. ALTERATION OF WORKS

Subsection 373.403(7), F.S., defines "alter" as follows:

"Alter" means to extend a dam or works beyond maintenance in its original condition, including changes which may increase or diminish the flow or storage of surface water which may affect the safety of such dam or works.

Alteration activities *do* require permits. However, maintenance activities *do not* require permits, if within the scope of the exemption.

III. MAINTENANCE CHECKLIST

The following checklist has been developed as a tool to assist in the determination of whether an activity is maintenance or an alteration. Before using the checklist, you may wish to obtain the following information:

1. Original design specifications;
2. A location map or other information indicating where spoil materials will be deposited;
and
3. A record of past routine maintenance activities.

After receiving this information, the following checklist should be consulted by District staff.

1. The activity should not change the original design specifications. An improvement or expansion of hydraulic capacity does not fall within the exemption. If construction drawings exist which depict the original or permitted dimensions, then maintenance activities should be done with a goal of restoring or maintaining the original dimensions.¹
2. All spoil material must be deposited on a self-contained, upland spoil site which will prevent the escape of the spoil material into waters of the state.
3. Any proposed dredging should be only to restore either a dike, or an irrigation or drainage ditch, to original design specifications.

¹ If construction drawings do not exist, then it may be necessary to limit excavation to the removal of vegetation only, unless it can be demonstrated that shoaling has occurred. If shoaling has occurred and vegetation is still evident beneath the barren shoal, the shoal may be removed to the depth which exposes buried vegetation. If the shoal has remained in place long enough for a plant community to become established, then a soil boring should be performed in order to ascertain the location of the bottom prior to the occurrence of the shoal. The District's Environmental Resource Compliance Division should always be consulted before beginning these activities.

4. The activity should be consistent with past routine maintenance activities. New activities should not be greatly in excess of what has been done on a routine basis in the past.
5. The work should not be extensive or anticipated to have more than a minimal adverse environment impact.
6. The activity must not occur within 200 feet of wetlands or be connected to wetlands.
7. Changes should not increase or diminish the flow or storage of surface water, thereby affecting the safety of a dam or works.
8. In the case of maintenance dredging, control devices should be utilized at the dredge site to prevent turbidity and toxic or deleterious substances from discharging into adjacent waters during maintenance dredging.
9. Natural or manmade barriers, which separate a canal or canal system from adjacent wetlands or other surface waters, should not be removed.

STATE WATER QUALITY CERTIFICATION

Section 401 of the Clean Water Act authorizes states to determine whether activities permitted by the federal government are in accordance with state water quality standards. (33 U.S.C. Section 1341) Pursuant to Rule 40E-4.303(1), F.A.C., issuance of an individual or standard general environmental resource permit constitutes certification of compliance with state water quality standards, unless the permit is issued pursuant to the net improvement provisions of subsection 373.414(1)(b), F.S., or the permit specifically denies such certification.

Subsection 373.414(1)(b), F.S., provides that "if the applicant is unable to meet water quality standards because existing ambient water quality does not meet standards, the governing board or department shall consider mitigation measures proposed by the applicant that cause net improvement of water quality in the receiving body of water for those parameters which do not meet standards."

If a review of a water quality mitigation proposal indicates that it will provide a net improvement of the parameter that does not meet standards, a permit may be issued, assuming all other permitting criteria are met. Such permits must include a specific condition which states the following:

"The State of Florida herein notifies the U.S. Army Corps of Engineers and any other interested parties that this permit is issued pursuant to Section 373.414(1)(b), F.S., and does not constitute certification of compliance with state water quality standards pursuant to Section 401 of the Clean Water Act."

Unless the EPA elects to issue or deny water quality certification for the project, water quality consideration is considered waived, and the Corps may proceed with issuance of the federal dredge and fill permit.

COASTAL ZONE CONSISTENCY DETERMINATIONS

The Coastal Zone Management Act requires applicants for federal permits in a state's coastal zone to furnish a certification that the proposed activity will be consistent with the state's coastal zone management program. (16 U.S.C. Section 1456 (c) (3)) Pursuant to Rule 40E-4.303(2), F.A.C., a complete application for an individual or standard general environmental resource permit for projects located in or seaward of coastal counties, and which have regulated activities in, on or over wetlands or other surface waters also constitutes a request for the State's concurrence that the project is consistent with the Florida Coastal Zone Management Program. Final agency action on the permit shall constitute the state's determination as to whether the activity is consistent with the federally approved Florida Coastal Zone Management Program. (Section 373.428, F.S.)